CASE LAW UPDATE AND APPELLATE CASES IN THE HOPPER

PUBLIC DEFENDERS CONFERENCE
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Removal From The Sex Offender Registry

- Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)
  - Respondent was arrested for **criminal solicitation of a minor** for engaging in anonymous internet chatroom conversations.

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- Respondent pled guilty and was given a suspended sentence of one year on probation, **but ordered to register as a sex offender for life,** as mandated for criminal solicitation of a minor.

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- SORA [in South Carolina] **does not provide any judicial review** for registrants to demonstrate their individual risk of recidivism **and seek removal from the registry**.

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- Respondent filed **a petition in the circuit court for a declaratory judgment**, claiming the **lifetime duration** of his sex offender registration . . . **deprives him of due process** [and equal protection], and warrants equitable relief in the form of his removal from the registry. [John Ozmint and Elise Crosby].

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- **HELD**: "We hold SORA's lifetime registration requirement is unconstitutional **absent any opportunity for judicial review to assess the risk of re-offending.**"

- Lifetime registration "without any opportunity for judicial review **violates due process** because it cannot be deemed rationally related to the General Assembly's stated purpose of protecting the public from those **with a high risk of reoffending**."

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- "We recognize the development of a judicial review process **is a matter best left to the General Assembly**…"

Removal from the Sex Offender Registry

Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (June 9, 2021)

- "We hereby reserve **the effective date of this opinion for twelve (12) months** from the date of filing to allow the General Assembly to correct the deficiency in the statute regarding judicial review."

- Appellants shall immediately remove Respondent from the sex offender registry. [Blake Williams, Amber Hendrick and Dan Westbrook for Appellate Defense, *Amicus Curiae*].

Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020)
  - A large crowd gathered at "A Place in the Woods," a nightclub in Huger. The victim in this murder case was Trey Manigault.
  - Manigault told people petitioner and his uncle, **Kinloch**, were following him around.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- Manigault allegedly told the bartender, "**[Kinloch]** is going to shoot me, **they** are going to kill me."
- A fight erupted in the parking lot at closing time. Several shots were fired. Witness Jenkins said he was "100% sure **petitioner shot Manigault.**"
- Another witness said **petitioner was hitting Manigault** but that petitioner was running away when she heard four gunshots.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- **Petitioner** told the police he saw **a "suspect" shoot at Manigault** when he was only several feet away.
- At trial, petitioner's uncle, **Kinloch, denied shooting Manigault** and he denied he previously admitted to two other people that he shot Manigault.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- Another witness, Grant, testified for the co-defendant petitioner that **Kinloch** admitted to him that he shot Manigault. **The state's hearsay objection to this testimony was sustained, however**.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- **JURY INSTRUCTIONS**:
  - The state argued it was entitled to an accomplice liability instruction because the defense tried to suggest Kinloch shot Manigault. The judge charged the **"hand of one is the hand of all"** over the defense's objection.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- The jury later sent out a **question regarding "accomplice liability"** and two hours later **Petitioner Washington was convicted of voluntary manslaughter** as a lesser-included offense of murder.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- Often overlooked fundamentals:
  - For purposes of **accomplice liability**, a person who joins with another to commit a crime is criminally responsible for everything done by the other person **which happens as a natural and probable consequence of the act**.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- If two or more people (1) are together, (2) acting together, **and, (3) assisting each other in committing the offense, all are guilty**.
- A finding of **a prior arranged plan or scheme is necessary** for criminal liability to attach to the accomplice who does not directly commit the criminal act.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- For an **accomplice liability** instruction to be warranted, **the evidence must be "equivocal on some integral fact** and the jury [must have] been presented **with evidence upon which it could rely to find the existence or nonexistence of that fact**."
    - Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011).

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- In this case, there was evidence petitioner was the shooter. There was also evidence petitioner **was not** the shooter.
- THE CRITICAL ISSUE: The question becomes whether there was equivocal evidence the shooter, if not petitioner, **was an accomplice of petitioner**.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- Based on the evidence presented in this case, **Kinloch** is the only possible person who could fall into the category of petitioner's accomplice.
- Therefore, if the record contains no evidence **Kinloch** was the shooter, then the **accomplice liability** instruction **should not have been given**.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- Here, there was no evidence Kinloch was armed with a firearm, and there was no evidence **Kinloch** shot Manigault.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- "Was Kinloch telling the truth? Perhaps not. However, as we observed in Barber, **an alternate theory of liability may not be charged to a jury** `merely on the theory the jury **may believe some of the evidence and disbelieve other evidence.**'"
  - 393 S.C. at 236, 712 S.E.2d at 438.

State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (September 2, 2020) Accomplice Liability, "Hand of One is the Hand of All" Instruction was Erroneously Charged.

- "We also hold the trial court's **accomplice liability** instruction **prejudiced petitioner**." **Reversed and Remanded for a New Trial.**
- [Steve Davis and Kristen Smalls (trial); Jack Swerling and Katherine Goode (appeal)]

Error to Charge Transferred Intent in an Attempted Murder Case.

- State v. Robert Geter, Op.No. 5851 (Ct.App. August 18, 2021)
  - Geter was in a bar fight where he claimed self-defense in the stabbing death of one man, and the severe injury **to another man, Stone**.

State v. Robert Geter, Op.No. 5851 (Ct.App. August 18, 2021) Error to Charge Transferred Intent in an Attempted Murder Case.

- Geter was charged with **attempted murder** for the injuries to Stone, and for murder for the other man's death.
- Geter maintained that **the injuries to Stone were essentially collateral damage** as he was fighting off several men.

State v. Robert Geter, Op.No. 5851 (Ct.App. August 18, 2021) Error to Charge Transferred Intent in an Attempted Murder Case.

- The trial judge instructed the jury **on transferred intent on the attempted murder charge for Stone's injuries** over the objection of trial attorneys Aimee Zmroczek and Ryan Schwartz.

State v. Robert Geter, Op.No. 5851
(Ct.App. August 18, 2021)
Error to Charge Transferred Intent in an Attempted Murder Case.

- HOLDING: "Geter argues the circuit court erred in charging the jury on the doctrine of **transferred intent** to support the attempted murder charge. We agree."

State v. Robert Geter, Op.No. 5851 (Ct.App. August 18, 2021) Error to Charge Transferred Intent in an Attempted Murder Case.

- To support that charge [attempted murder] the state must demonstrate **Geter** attempted to kill Stone, and that was **not the State's theory of the case**.

State v. Robert Geter, Op.No. 5851 (Ct.App. August 18, 2021) Error to Charge Transferred Intent in an Attempted Murder Case.

- So long as attempted murder is **a specific intent crime**, **transferring the intent to kill** does not satisfy the necessary mens rea to convict a defendant of the attempted murder **of an unintended victim**

Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- State v. Randy Collins, Op. No. 5851 (Ct. App. filed September 8, 2021)
  - Collins was convicted of arson and conspiracy for assisting a mother in burning a building in which her child was tragically killed to collect property insurance money.

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- "Collins correctly contended he was coerced and tricked into making inculpatory statements **by the officers' misrepresentation that his statement would not be used against him**, and that `his statement would not leave the room.'"
- This "**rendered the previous Miranda warnings meaningless**."

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- Collins correctly argued that the defendant's "statement was induced by implied promises of leniency and **threats that he would die in prison if he did not cooperate**."

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- See State v. Osborne, 301 S.C. 363, 365, 367, 392 S.E.2d 178, 179, 180 (1990) (threat to "bring her ass up on charges" if she knew information)
- and State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (promise not to seek the death penalty if the defendant gave a statement).

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- Collins also correctly asserted his **low level of education**, recent stroke and cognitive impairments, along with the officers' *coercive tactics*, demonstrate his confession was not voluntary.

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- The Court of Appeals agreed "under the totality of the circumstances, **his will was overborne** and his statement *was not voluntarily given*."

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- Assuredly, interrogating officers **can make false representations concerning the crime or the investigation** during questioning without always rendering an ensuing confession coerced. **But false promises stand on a different footing**. United States v. Preston, 751 F.3d 1008 (9th Cir. 2014).

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- ERROR PRESERVATION:

  "We note **there is no dispute as to what occurred** and what was said during the interview at hand, as **we have the video of it before us**. Upon a thorough review of the **recording**, as well as the **Jackson v. Denno hearing**, we find, **under the totality of the circumstances, the trial court erred** in admitting Appellant's recorded statement." [Ralph Wilson, Jr., trial and Brandon Gaskins, Appellate Project on the appeal]

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- All factors considered in finding statement involuntary:
- His **low level of education** (special education though no diagnosed intellectual disability)
- (2) his *physical health problems*;

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises of Confidentiality and *False Representations* v. *False Promises* and Threats

- (3) His statement was be the product of **promises** that no matter what he told them, **he would be allowed to go home**;
- (4) consistent assurances that Appellant was not the person they sought to hold culpable of the crime;
- (5) **suggestions** (threats) that if they did not get information from him implicating Cohen (the mother), **they would come after him**;

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises Of Confidentiality and *False Representations* v. *False Promises* and Threats

- (6) threats that Appellant **could go to jail for thirty-four years** and, given his age and poor health, he likely would never come home from incarceration;
- (7) promises **to "speak up" for appellant** and "talk" for him if he gave them the information they wanted; and,

State v. Randy Collins, Op. No. 5851 (Ct. App. Filed September 8, 2021) – Confession Ruled Involuntary; Promises Of Confidentiality and *False Representations* v. *False Promises* and Threats

- most importantly, (8) **assurances that whatever appellant told them would not leave that room.**

State's Burden of Proof to Prove an Exigency for a Blood Draw

- State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
  - The driver, Ms. Key, was unconscious after the car accident where the Trooper suspected DUI.
  - Trooper Campbell arrested **the unconscious Key for DUI** at 10:35 a.m. and **read her implied consent rights to her at 10:36 a.m.**

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- Without seeking a search warrant, **Trooper Campbell asked a nurse to draw Key's blood. It was .213.**
- Trooper Campbell acknowledged **the on-duty magistrate was only three miles from the hospital** on the morning of the accident.

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- LAW: "The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant."

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- Missouri v. McNeely, 569 U.S. 141, 165 (2013) (holding the determination of whether a warrantless blood draw of a DUI suspect qualifies **as an exigent circumstance involves a case-by-case analysis…**

State v. Key, 431 S.C. 336, 848 S.E.2d 315
(Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- …**of the totality of the circumstances** and that the natural dissipation of alcohol in the bloodstream alone **does not establish a per se exigency**);

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016) (holding a lawful search incident to arrest of a DUI suspect *permits a warrantless breath test* **but not a warrantless blood draw**).

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020) State's Burden of Proof to Prove an Exigency for a Blood Draw

- In Mitchell v. Wisconsin, 139 S.Ct 2925, 2531 (2019), the United States Supreme Court held the exigent circumstances exception to the warrant requirement "**almost always justifies the warrantless drawing of blood** *from unconscious DUI suspects*."

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- "We . . . part company with the Mitchell Court, as **we will not impose upon a defendant the burden of establishing the absence of exigent circumstances**."

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- "We have consistently **held the prosecution** has the sole burden of proving the existence of an exception to the warrant requirement."

State v. Key, 431 S.C. 336, 848 S.E.2d 315 (Re-filed September 2, 2020)
State's Burden of Proof to Prove an Exigency for a Blood Draw

- Justice Few concurring, wrote, "The plurality's statements [in Mitchell] are confusing and misleading [as to the burden of proof], and difficult to apply in light of other Supreme Court decisions."
- The "burden" of proving exigency is on the government. (James Price, Powers Price, and Jeff Wilkes).

Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- **In the hopper**: State v. Mary Ann German, Appellate Case No. 2018-002090 - (Argued September 21, 2021)
  - **Three years after** Missouri v. McNeely, 569 U.S. 141 (2013).

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- In McNeely, the United States Supreme Court held that "while **the natural dissipation of alcohol** in the blood may support a finding of exigency in a specific case . . . **it does not do so categorically**." 569 U.S. at 156. [Scott Lee and David Alexander].

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- The Court ultimately held, "In those drunk-driving investigations where police officers **can reasonably obtain a warrant before a blood sample** can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 152.

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- HERE, the State argued the blood draw and toxicology results were admissible under the DUI statute **and under the good faith exception**.

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- The defense notes that: McNeely "was over **three years old** when this happened" and therefore the good faith exception did not apply.

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- The defense also argued that McNeely was binding U.S. Supreme Court precedent and subsequent state appellate court opinions "dodging" the application of McNeely were irrelevant.

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- The State expressly **waived any argument at trial that the exigent circumstances** exception applied – the police could have gotten a warrant, but they were solely relying on the statute and good faith exception.

In The Hopper:

State v. Mary Ann German, Appellate Case No. 2018-002090 (Argued September 21, 2021) Felony DUI – Warrantless, Nonconsensual Blood Draw While Restrained.

- The defense also argued that the blood draw without a warrant violated **the right to privacy under the South Carolina Constitution**.

Knowing use of an Invalid Search Warrant for Phone Records, and the Right to a Biggers Hearing **on Surveillance Tape Identification**

- **In the Hopper:** State v. Justin Warner – Case No. 2020-000930 – (**to be argued 10/14/2021 in the Supreme Court)**
  - An invalid search warrant issued **by a magistrate in Anderson for phone records in New Jersey.**
  - The solicitor and police had "**a custom**" of using these invalid search warrants.

In The Hopper:

State v. Justin Warner – Case No. 2020-000930 (**To Be Argued 10/14/2021)**– Knowing Use of an Invalid Search Warrant for Phone Records, and the Right to a Biggers Hearing **on Surveillance Tape Identification**

- Warner argued the use of this invalid search warrant **cannot be saved** by the "good faith" exception, since the state was not relying on binding appellate precedent in good faith **given that custom**.(Bruce Byrholdt and Bruce Harvey).

In The Hopper:

State v. Justin Warner – Case No. 2020-000930 (**To Be Argued 10/14/2021)**– Knowing Use of an Invalid Search Warrant for Phone Records, and the Right to a Biggers Hearing **on Surveillance Tape Identification**

- Warner also argued he should have been granted a Neil v. Biggers identification hearing on the unduly suggestive nature of the identification **by Probation Agent Nathan Goolsby from a surveillance tape.**

In The Hopper:

State v. Justin Warner – Case No. 2020-000930 (**To Be Argued 10/14/2021)**– Knowing Use of an Invalid Search Warrant for Phone Records, and the Right to a Biggers Hearing **on Surveillance Tape Identification**

- Further, the man in the video was wearing **a hat and sunglasses**, and Probation Agent Goolsby said **he recognized Warner from his "walk,"** and where the police **asked Agent Goolsby if the man in the video was petitioner.**

Certiorari Granted On September 14, 2021 – Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- **In the Hopper**: State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020) (James Smiley and Laree Hensley represented Stewart Middleton)
  - Company Christmas party at the Embassy Suites in Charleston
  - Drunken co-workers have sex, **and the only issue is "consent" or "criminal sexual conduct in the third degree"** based on incapacity.

IN THE HOPPER:

State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020)
Certiorari Granted On September 14, 2021 –
Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- Detective Bailey was asked how many times she scheduled an interview with petitioner? Defense counsel objected on the basis of relevance.

IN THE HOPPER:

State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020)
Certiorari Granted On September 14, 2021 –
Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- Detective Bailey said it took Middleton 17-20 days to respond to her call, and then he did not show up for the first two meetings, **and he would only call back "after the fact."**
- Court of Appeals affirmed in an unpublished opinion.

IN THE HOPPER:

State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020)
Certiorari Granted On September 14, 2021 –
Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- Certiorari granted on the issue of: "Whether the Court of Appeals erred **by finding no abuse of discretion** in the trial court allowing Detective Bailey to testify that…

IN THE HOPPER:

State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020)
Certiorari Granted On September 14, 2021 –
Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- …petitioner did not show up **for two appointments** with her, and that it allegedly took him *seventeen to twenty days* to meet with the detective as she requested, **since this testimony was not relevant to the issue of petitioner's guilt or innocence**?"

IN THE HOPPER:

State v. Stewart Jerome Middleton, 2020-UP-271 (September 30, 2020)
Certiorari Granted On September 14, 2021 –
Law Enforcement Opinion that the Defendant is Acting Suspiciously or is Guilty

- Irrelevant (Rule 401) and unduly prejudicial (Rule 403) law enforcement lay opinions **signaling to the jury what witnesses and people they believe or do not believe** is becoming widespread in our state.
- **BE ON GUARD FOR IT, AND OBJECT.**

Bolstering if the Child "Merely" Receives Treatment?

- State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021)
  - The Court of Appeals reversed the third-degree CSC with a minor conviction holding Rich's (a **"childhood trauma therapist**") testimony that **she treated Minor** implied she believed Minor was telling the truth and **improperly bolstered Minor's credibility**. (Greenville - Tom Quinn at trial, Taylor Gilliam on appeal).

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if The Child "Merely" Receives Treatment?

- This case is distinguishable from precedent cited by the parties because Rich's alleged improper **bolstering was not direct.**
- Rich's simple affirmation that she provided therapy to Minor also **differs from previous indirect vouching** cases in which expert witness testimony *was more extensive*.

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if the Child "Merely" Receives Treatment?

- Prior precedent: State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (holding forensic interviewer's testimony that child victim should "not be around [appellant] for any reason" **improperly bolstered** the child victim's credibility).

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if the Child "Merely" Receives Treatment?

- Prior precedent: Kromah, 401 S.C. at 359, 737 S.E.2d at 500 (ruling forensic interviewer's testimony about "a compelling finding of child abuse" was the **equivalent of her stating the child was being truthful)**;

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if the Child "Merely" Receives Treatment?

- State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (concluding there was no other way to interpret the language in the forensic interviewer's reports that each child had **"provide[d] a compelling disclosure of abuse** by [appellant]" **than to mean she believed the children were truthful**).

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if the Child "Merely" Receives Treatment?

- In practical terms, the Court of Appeals' ruling **would require the exclusion of treating experts' testimony in general**—a result the defendant acknowledged he is seeking.

- Rich's testimony as Minor's treating therapist **was required to lay the foundation for introducing Minor's graphic drawing** into evidence.

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if the Child "Merely" Receives Treatment?

- The Supreme Court held: While we find **no improper bolstering** occurred in this case, "we repeat our warning in Anderson (413 S.C. 212, 776 S.E.2d 76) about **dual experts instead of using a 'blind expert.'"**

State v. Makins, 433 S.C. 494, 860 S.E.2D 666 (June 23, 2021) - Bolstering if The Child "Merely" Receives Treatment?

- While we rule in the State's favor on these facts, **this opinion should not be construed as a retreat from our warning in Anderson.**

Cannot Instruct Inferring Knowledge and Possession **from the Substance Being Found on Property under the Defendant's Control** in Drug Case.

- State v. Terrance Stewart, 433 S.C. 382, 858 S.E.2d 80 (filed May 19, 2021)
  - The Supreme Court ***overruled*** State v. Adams, 291 S.C. 132, 352 S.E.2d 483 where Adams had held, "The proper charge on constructive possession is to instruct the jury that the *defendant's knowledge and possession may be inferred* if the substance was found on premises under his control."

State v. Terrance Stewart, 433 S.C. 382, 858 S.E.2d 80 (Filed May 19, 2021) – Cannot Instruct Inferring Knowledge and Possession **from the Substance Being Found on Property under the Defendant's Control** in Drug Case

- This now condemned instruction in State v. Adams replaced *an even worse* one that "Articles in dwelling house **may be deemed** to be **in constructive possession of person controlling house** in the absence of evidence to the contrary . . ."

State v. Terrance Stewart, 433 S.C. 382, 858 S.E.2d 80 (Filed May 19, 2021) – Cannot Instruct Inferring Knowledge and Possession **from the Substance Being Found on Property under the Defendant's Control** in Drug Case

- "The trial court's definition of constructive possession—including the requirement the State prove knowledge and intent—**was followed almost immediately with the opposite statement**, **permitting the jury to infer the defendant's knowledge** from the simple fact the drugs were on his property."

State v. Terrance Stewart, 433 S.C. 382, 858 S.E.2d 80 (Filed May 19, 2021) – Cannot Instruct Inferring Knowledge and Possession **from the Substance Being Found on Property under the Defendant's Control** in Drug Case

- "The improper explanation of the inference of knowledge and possession permitted the jury to find Stewart guilty of simple possession and trafficking **without the State proving knowledge and intent**, a scenario not permitted under the legal principle of possession . . ." (Rauch Wise, trial and appeal).

Juror and/or Bailiff Misconduct

- State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (filed November 12, 2020)
  - After the jury deliberated for close to four hours, the trial court was alerted to questionable contact between a bailiff and a juror.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- While the trial court conferred with counsel about the contact, the jury reached a verdict. The trial court received the verdict in open court **and sent the jury back to the jury room**.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- The trial court then **brought each juror out separately for individual questioning on the record**. All denied any improper conversation with the bailiff.

- Bailiff Johnny Bolt testified **a juror had asked him what would happen in the event of a deadlock**, and he responded the judge would likely give them an Allen charge and ask if they could stay later.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- The Court of Appeals had noted: Our federal and state constitutions guarantee a criminal defendant **the right to a trial by an impartial jury**. U.S. Const. amend. VI; S.C. Const. art. I, §§ 3, 14.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- The right can be infringed **when a third party makes improper contact with the jury**, for the right is meaningful only if the jury remains free from outside influence, including exposure to evidence or information that has not been introduced during the trial. Turner v. Louisiana, 379 U.S. 466, 471–72 (1965).

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (**Sixth Amendment violated** when jurors overheard **bailiff describe defendant as a "wicked fellow" who "was guilty"** and if there was anything wrong with a guilty verdict, "the Supreme Court will correct it").

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- COURT OF APPEALS HELD: "Because the evidence excludes any reasonable possibility that the **bailiff's misconduct influenced the jury's impartiality or its verdict**, the trial court did not abuse its discretion **in denying Green's mistrial motion.**" [Tristan Shaffer at trial, and Susan Hackett on appeal].

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- Supreme Court granted certiorari: "We do wish . . . to clarify the court of appeals' analysis concerning the bailiff misconduct issue."

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- In the Sixth Amendment context, the Supreme Court of the United States has held that "**any private communication, contact, or tampering** ... with a juror during a trial about the matter pending before the jury **is ... deemed presumptively prejudicial.**" Remmer v. United States, 347 U.S. 227, 229 (1954).

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- The Court in Remmer concluded: "The presumption is not conclusive, **but the burden rests heavily upon the Government to establish ... that such contact with the juror was harmless** to the defendant."

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- "We readily agree with the court of appeals that **the State 'overthrew' any presumption of prejudice**, if it applied."

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **The trial court questioned each juror and the bailiff**, which proved "there was no reasonable possibility the [bailiff's] comments influenced the verdict."

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- "Our unwillingness to categorically apply the Remmer presumption of prejudice stems from our view that **not every inappropriate comment by a bailiff to a juror rises to the level of constitutional error**."

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- Where **a juror asks a bailiff a question that is of a substantive nature** . . . the bailiff should not comment except to request that the question be placed in writing so it can be delivered to the judge.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440 (Filed November 12, 2020) Juror and/or Bailiff Misconduct

- "While we decline to adopt the Remmer presumption of prejudice in every instance of an inappropriate bailiff communication to a juror,…"

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **"…the occasion of this case presents an opportunity for our clerks of court and circuit judges to ensure that all bailiffs are properly trained."**

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **See State v. Bryant,** 354 S.C. 390, 581 S.E.2d 157 (2003)
  - Defense counsel [Ed Chrisco] filed a motion for a new trial **with juror affidavits attached** after the defense learned of improper law enforcement contacts with potential jurors' families prior to the death penalty trial.
  - The trial judge granted a motion for an evidentiary hearing.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **See State v. Bryant,** 354 S.C. 390, 581 S.E.2d 157 (2003)
  - Prior to the hearing, the state and appellant agreed **the trial judge would individually voir dire the twelve jurors and two alternates** who sat on appellant's jury and ask a limited number of questions submitted by the parties.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **See State v. Bryant,** 354 S.C. 390, 581 S.E.2d 157 (2003)
  - We find the questioning of jurors' family members by Horry County Police detectives in a case in which the victim was a Horry County Police Department Officer was, at minimum, an attempt to influence the jury.

State v. Fabian Green, 432 S.C. 97, 851 S.E.2d 440
(Filed November 12, 2020)
Juror and/or Bailiff Misconduct

- **See State v. Bryant,** 354 S.C. 390, 581 S.E.2d 157 (2003)
  - We conclude the jury investigation produced a jury which was not fair and impartial and, therefore, **appellant's Sixth and Fourteenth Amendment rights were violated.**

Drug Deal – Self Defense – Accident

State v. Owens, ___ S.C. ___, 860 S.E.2d 357 (filed June 16, 2021)

- affirmed the Court of Appeals opinion, while not addressing the proposed jury instruction of the Court of Appeals in a case involving (1) an illegal drug deal, (2) an illegal gun, and (3) self-defense and accident.

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- Small scale drug deal in a car on the streets of Charleston.
- The defendant's defense was that the drug dealer pulled a gun on him (he did not bring a gun to the drug deal), the defendant was able to get possession of the gun, and **he shot the drug dealer by accident while acting in self-defense**.

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- The trial judge instructed: "The defendant has also raised the defense of accident. An act may be excluded on the ground of accident if it is shown that the act was unintentional, **that the defendant was acting lawfully**, and that reasonable care was used by the defendant in handling the weapon."

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- "Owens [Jason King and John Kozelski] objected to the instruction, arguing the jury might interpret it to mean Owens **could not claim accident because he was involved in the unlawful activity of a drug deal**."

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- **Case Law:** State v. Burriss**,** 334 S.C. 256, 259–64, 513 S.E.2d 104, 106–09 (1999)
  - (holding defendant was entitled to an accident instruction because evidence showed his use of a weapon could have been lawful self-defense, **even though minor defendant may have possessed the weapon unlawfully** and **violated the law against "pointing and presenting" a firearm**).

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- State v. McCaskill, 300 S.C. 256, 258–59, 387 S.E.2d 268, 269–70 (1990)
  - (**error in failing to charge** that if the defendant **lawfully armed herself in self-defense** because of a threat to her safety in her home created by the victim, **and the gun accidentally discharged, the jury would have to find her not guilty**).

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- **Proposed jury instruction:** A defendant exercising due care who accidentally harms another while acting in self-defense is acting lawfully.

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- Therefore, a defendant can be acting lawfully, even if he is **in unlawful possession of a weapon**, if you find he was entitled to arm himself **in self-defense** *and* the victim was shot **by accident** by the unintentional discharge of the weapon.

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- Cf. State v. Williams, 427 S.C. 246, 830 S.E.2d 904 (2019) – "Intentionally bringing a loaded, **unlawfully**-possessed pistol to an *illegal drug transaction* is **calculated to produce a violent occasion."**

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- "Williams' pistol was not simply a convenience for him so he could protect himself just in case violence arose. Rather, it is well-documented that **the mere presence of guns at illegal drug transactions *produces*** the violence."

Drug Deal – Self Defense – Accident
State v. Owens, 860 S.E.2d 357 (Filed June 16, 2021)

- "In some future case involving facts different from these, perhaps the defendant will convince the trial court **he has produced evidence he was not at fault in bringing on the violent occasion**."

"Telling The Truth" – When it is Bolstering

- State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (filed December 16, 2020)
  - Defense counsel Richard Warder objected to doing a competency determination of an alleged child sex victim **in the presence of the jury** arguing it would **constitute "bolstering" of the child**.
  - In the presence of the jury, over objection, the child said she *knew the difference between the truth and a lie*.

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- However, the solicitor also asked, "So you understand when **we're** in here, **we're** going to talk about the truth, you understand that?" The child said she understood.

- "The judge **ruled in the presence of the jury**, 'I think, under Rule 601, [SCRE,] **she is competent** unless otherwise disqualified.'"

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) –
"Telling The Truth" – When it is Bolstering

- HELD: "The trial court made the comment about Minor's **competency in conjunction with a formal reference to Rule 601(a)** before Minor gave any factual testimony."

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- Under these circumstances, we hold a reasonable juror could not have considered the trial court's comment as **an indication the trial court believed Minor was credible.**
- As to the solicitor's questioning of the child that "when **we're** in here, **we're going to talk** about the truth" the Court held that **"the questions . . . were improper**."

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- The Court *compared this to* **State v. Kelly**, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd and remanded on other grounds by* Kelly v. South Carolina, 534 U.S. 246, where "We held **the solicitor impermissibly bolstered** the credibility of the state's witness—a jailhouse informant . . .

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- . . . by asking the following questions of the witness: "What **did *I* tell you** *that I absolutely required* regarding your testimony to this jury today?" and "*Did* ***I tell you to tell*** *the truth to this jury*?"

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- HELD: "Here, the solicitor used the ***first-person pronoun 'we'*** when questioning Minor about telling the truth."

- "While the first-person questions in this case were not as egregious as the questions asked in Kelly, **the questions in this case were improper**."

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- However, the Court found **the bolstering error harmless** given **the jury instruction on weighing a child's testimony which included** the jury determining whether the **child understood** "the seriousness of appearing as a witness at a criminal trial," and whether "the child understood the questions asked."

State v. Jose Reyes Reyes, 432 S.C. 394, 853 S.E.2d 334 (Filed December 16, 2020) – "Telling The Truth" – When it is Bolstering

- "Crucially, the final paragraph of the credibility charge **instructed the jury to assess the credibility of a child witness through a more suspect lens,** thus removing any improper influence that arose from the solicitor's questioning." (Kathrine Hudgins on appeal).

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- ISSUE: Which side has the burden of proof as to whether a defendant has been given his or her Miranda warnings for purposes of whether or not a Doyle v. Ohio violation has occurred?

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- Defense counsel Mark Archer proffered the defendant's testimony that he had been given his Miranda warnings.
- In the proffer, Green testified he was involved in a high-speed chase and once he was apprehended, "**this guy … read me my rights**," and told Green he had "like eleven warrants."

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- The state proffered the testimony of the arresting officer and the K-9 officer **who both denied** giving Green Miranda warnings.

- Following the proffer, the solicitor argued that Doyle does not apply if no Miranda warnings are given.

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- Court of Appeals noted: "Our courts have applied Doyle . . . to hold the Due Process Clause prohibits the prosecution from commenting on an accused's post-Miranda silence."

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- Additionally, our courts have found no due process violation from cross-examination on a defendant's silence for impeachment purposes when the record **was devoid of evidence** that the defendant received Miranda warnings.

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- See State v. Bell, 347 S.C. 267, 271, 554 S.E.2d 435, 437 (Ct. App. 2001)
  - (finding no due process violation when there was "no evidence in the record that Bell ever received Miranda warnings" and **refusing to presume the warnings were given at the time of Bell's arrest**).

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- Research reveals **no South Carolina cases . . .** addressing whether a Doyle violation has occurred based upon comments on an accused's silence **when there is competing evidence** as to whether a defendant has been administered his Miranda rights.
- However, our sister state, Georgia, has held **the burden rests on the defendant** to show a Doyle violation has occurred.

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- ERROR PRESERVATION ARGUMENT:
  - In this case there was also **a dispute about whether the judge refused to view body camera evidence** *or* **whether the defense failed to timely offer it or request more time to do so.**

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- Joanna Delany's issue on certiorari filed March 25, 2021:
  - "Whether the Court of Appeals erred . . . **by holding a testifying defendant had to prove** he received Miranda warnings to establish a Doyle violation…

IN THE HOPPER:

State v. Tappia Green, 432 S.C. 572, 854 S.E.2d 626 (Filed Ct.App. February 3, 2021) (*Certiorari Petition Filed in the Supreme Court)*

- …rather than concluding the prosecution, as the proponent of the evidence had the burden **to show a testifying defendant did not receive Miranda warnings before it could permissibly use his post-arrest silence for impeachment** . . .”

CASE LAW UPDATE AND APPELLATE CASES IN THE HOPPER

PUBLIC DEFENDERS CONFERENCE
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